IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1566

ARIZONA PUBLIC SERVICE COMPANY,
DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES,
EL PASO ELECTRIC COMPANY,
NEVADA POWER COMPANY,
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT,
SAN DIEGO GAS & ELECTRIC COMPANY,
SOUTHERN CALIFORNIA EDISON COMPANY,
TUCSON GAS AND ELECTRIC COMPANY,
UTAH POWER AND LIGHT COMPANY,
Petitioners,

v.

CHEMEHUEVI TRIBE OF INDIANS,
COCOPAH TRIBE OF INDIANS,
COMMITTEE TO SAVE BLACK MESA,
EMMA YAZZIE,
JIMMY YAZZIE,
PAUL BEGAY,
CHESTER HUGH BENALLY,
BEN BEGAY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted by the Intervenors In That Court

May 6, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted by the Intervenors In That Court

The Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of

Appeals for the District of Columbia Circuit, described below.

OPINIONS BELOW

The opinion of the court below is that of the United States Court of Appeals for the District of Columbia Circuit in *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission,* 489 F.2d 1207 (D.C. Cir. 1973), *rehearing denied* December 7, 1973, and December 19, 1973, on a petition of Chemehuevi Tribe of Indians, et al., for review of orders of the Federal Power Commission in Docket No. E-7664, dated November 4, 1971 (reported at 46 F.P.C. 1120), and December 10, 1971 (reported at 46 F.P.C. 1307).

Copies of the opinion of the Court of Appeals and of the orders of the Federal Power Commission are printed as an Appendix to this Petition, separately bound because of its length, pursuant to Rule 23(i.).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of the Court of Appeals was founded on Section 313(b) of the Federal Power Act, 16 U.S.C. Sec. 825*l*(b). Its judgment was entered November 9, 1973.

The court denied a petition for rehearing of the Federal Power Commission and of the intervenors other than the Department of Water and Power of the City of Los Angeles December 7, 1973, that of the latter on December 19, 1973.

Time for filing this Petition for Certiorari was extended to April 6, 1974, by order of Mr. Justice Douglas February 27, 1974, and to May 6, 1974, by order of the Chief Justice April 3, 1974.

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW:

Context

For over a half century the Federal Power Commission has consistently determined that under the Federal Water Power Act (now Part I of the Federal Power Act) it has licensing jurisdiction over hydroelectric plants only, *i.e.*, plants generating electricity by water power. Accordingly, in this case, it dismissed, sua sponte, a complaint which urged it to assert licensing jurisdiction, for the first time, over steam-electric generating plants. The Court of Appeals, while agreeing with the Commission that the explicit language of this Court in *FPC* v. *Union Electric Co.*, 381 U.S. 90, as well as the legislative history and consistent administrative interpretation of the Federal Power Act, required it to reject the argument that Section 4(e) of the Act extends the Commission's licensing jurisdiction to steam plants as "project works" in consequence of their use of waters of a navigable stream in their boilers and cooling operations, nevertheless held that Section 4(e) does confer licensing jurisdiction on the Commission with respect to utilization by steam plants of "surplus water" from any government dam for such purposes. It remanded the case to the Commission to determine whether the water used in the six steam plants involved here is "surplus water," and whether any jurisdiction that the Commission might have is affected in any way by the jurisdiction of any other federal agency. It did not define the term "surplus water."

These six thermal plants, situated in Arizona, Nevada, Utah and New Mexico consume waters of the Colorado River System for boiler and cooling purposes in conformity with the apportionments of consumptive use made in the Colorado River Compact, the Upper Colorado River Basin Compact, the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), and applicable regulations of the Secretary of the Interior.

The complainants are the Chemehuevi and Cocopah Tribes of Indians (users of Colorado River water), and others who do not allege ownership of water rights.

Issues

The questions presented for review are:

1. (a) Whether Section 4(e) of the Federal Power Act (16 U.S.C. Sec. 797(e)), which authorizes the Federal Power Commission to issue a license "for the purpose [*inter alia*] of utilizing the surplus water or water power from any Government dam," requires that a license be obtained for the use of water by thermal electric generating plants solely for boiler and cooling purposes, as contrasted with the use of water or water power for hydroelectric power generation, and, in particular,

(b) Whether a Federal Power Commission license is required for the use of water supplied to a thermal electric generating plant, solely for boiler and cooling purposes, by a federal agency other than the Federal Power Commission pursuant to acts of Congress which specify that consumptive use of water stored by a particular government dam shall be made only under a contract executed by that agency.

2. Whether a justiciable case or controversy is presented by the contentions of the complainants, and, in particular,

(a) Whether consumptive uses of water which are incontestably within the quantities apportioned by the Colorado River Compact to the basin in which such uses are made, and are within the quantities apportioned to the state of use by the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), or by the Upper Colorado River Basin Compact, are subject to challenge by users of water in any other basin or state; and

(b) Whether the water rights of the Chemehuevi and Cocopah Indian Tribes, being "present perfected rights," are so completely protected by the decree of this Court in *Arizona* v. *California, et al.*, and by the Colorado River Compact, against shortages occasioned by any other users of water as to render non-justiciable any claim on their behalf for further protection of their water rights by the Federal Power Commission; and

(c) Whether a complainant having no interest itself in the water which is used by another has standing to complain of that use.

STATUTORY PROVISIONS

Relevant extracts from the statutes involved are printed as Attachment A, following the signature page.

They are:

Sections 4(e) and 23 of the Federal Power Act, 16 U.S.C. §§ 797(e), 817.

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d.

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c).

Sections 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m.

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss(a), (b), 615uu(a),(b), 615vv.

Act of March 22, 1968, P.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968).

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521(b), (c), 1523(a),(b),(c),(d).

Articles III(a), (c), and VIII of the Colorado River Compact, H. Doc. 717, 80th Cong., pp. A19, A21.

Article III(a) of the Upper Colorado River Basin Compact, H. Doc. 717, 80th Cong., p. A169.

STATEMENT OF THE CASE

Proceedings in the Federal Power Commission

On September 10, 1971, the Chemehuevi Tribe of Indians, et al.[1] (Complainants), filed with the Federal Power Commission a Complaint, Petition for Order to Show Cause and Request for Expedited Procedure, against Arizona Public Service Company, et al.,[2] ask-

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[1] The Cocopah Tribe of Indians, the Sierra Club, Committee to Save Black Mesa, Emma Yazzie, Jimmie Yazzie, Paul Begay, Chester Hugh Benally, and Ben Begay.

[2] Nine "complainees" were named: Arizona Public Service Company, Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Tucson Gas & Electric Company, El Paso Electric Company, Nevada Power Company, Utah Power & Light Company, Department of Water and Power of the City of Los Angeles, San Diego Gas & Electric Company.

ing the Commission to assert licensing jurisdiction under Part I of the Federal Power Act [3] over six planned or existing steam electric generating plants [4] which use waters of the Colorado River System in their boilers and for cooling purposes.

The sole issue presented in the complaint was:

> "[D]oes the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" [5]

The Commission, sua sponte, entered an order November 7, 1971 (App. 78a), dismissing the Complaint for lack of jurisdiction, citing *FPC* v. *Union Electric Co.*, 381 U.S. 90, 110 (1965). It denied a petition for rehearing December 10, 1971 (App. 81a).

The complainants petitioned the Court of Appeals for the District of Columbia to review the Commission's orders, under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

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[3] 16 U.S.C. §§ 792-823. Part I, captioned "Regulation of the Development of Water Power and Resources," enacted in 1920 as the Federal Water Power Act, superseded the General Dam Act of 1906, 34 Stat. 386, and statutes applicable to individual dams.

[4] See Attachment B for a tabulation of ownership in each plant, and Attachment C, a location map. The Appendix, printed separately, contains a description of each plant with citations of federal water contracts and legislation authorizing such contracts. (App. 83a)

[5] As quoted in the court's opinion at 1211.

The Opinion of the Court of Appeals

On November 9, 1973, the court handed down its opinion (App. 1a). The court identified two issues (p. 1214):

> "Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are 'project works' necessary for the development of power along navigable waters or because the plants will utilize 'surplus water' from Government dams."

As to the first ground, the court, citing primarily *FPC* v. *Union Electric Company*, 381 U.S. 90 (1965), held that the six plants are not "project works" necessary for the development of power along navigable waters, and accordingly that the "navigable waters" clause of Section 4(e) did not confer licensing authority on the Commission. The court said, *inter alia* (pp. 1222-23):

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power."

It referred to the Federal Power Commission's 52 years' consistent interpretation of the act to the same effect (now 54 years), commencing with its first annual report in 1920, and said (p. 1224):

> "Because the 'unadorned language' of the Act, moreover, does not compel the interpretation for which petitioners contend, consistent administrative construction to the contrary commands our respect; indeed, it is entitled to 'great weight'. (Citing cases.)

* * * * *

> "It is not without significance, moreover, that this administrative interpretation was transmitted directly to Congress the year after passage of the Act, and that the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction." (p. 1225)

Moreover (p. 1225):

> "Consistent judicial interpretation also requires us to reject petitioners' argument that the Act extends the Commission's licensing jurisdiction to steam plants."

It might be thought that these conclusions disposed of the entire case.

Not so. Turning to the "surplus water" language of Section 4(e), the court said (p. 1235):

> "Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz [*sic*]—will draw water directly from impoundments created by a Government dam, and that the other four plants[6] are downstream from Government dams and will have water available on a dependable basis only because of the 'stream regimen imposed by upsteam government dams'. [Footnote omitted] According to petitioners, these are usages of 'surplus water' that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants.[7]

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[6] (Our footnote.) This assertion about the other four plants is an afterthought, not appearing in the Complaint or Petition for Rehearing submitted to the Federal Power Commission. See the restrictions on contentions to be considered on appeal, in Sec. 313(b) of the Federal Power Act.

[7] (Our footnote.) The court several times refers to all six power plants as the "Four Corners plants." Mohave is 375 miles from Four Corners, Navajo 137 miles, Kaiparowits 170 miles, Huntington 250 miles, San Juan 9 miles. See map, Attachment C.

> We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' 'surplus water' claim."

After citing pre-Federal Water Power Act cases involving hydroelectric projects using water diverted from reservoirs created by government dams, the court said (p. 1242):

> "Accordingly, we hold that the Commission erred in dismissing petitioners' complaint, and we remand to the Commission to consider the surplus water claim. We do not decide whether the FPC does have jurisdiction over the four plants alleged to be the beneficiaries of Government surplus water by virtue of their being downstream from Government dams because we have no record on which to base such a determination. We hold only that *the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants,* and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency." (Emphasis added; footnote omitted.)

The Power Plants Involved

The six steam electric generating plants involved are the Mohave Plant in Nevada, the Navajo Plant in Arizona, the proposed Kaiparowits Plant and the Huntington Plant in Utah, and the San Juan and Four Corners Plants in New Mexico. Their locations are shown on the map, Attachment C, and their ownerships are tabulated in Attachment B. All use waters

of the Colorado River System. Descriptions of the plants, their water supply, and the contractual and statutory basis thereof appear in the separately printed Appendix. (App. 83a)

The "Law of the River"

The uses of water by these plants are "consumptive uses," that is, the quantity returned to the stream is less than the quantity diverted.[8] The consumptive use of water is to be distinguished from non-consumptive use of water and water power, *e.g.*, in the generation of hydroelectric power.

The consumptive use of all waters of the Colorado River System is controlled by one or more of the elements of the "Law of the River," [9] *i.e.*, the opinion and decree of this Court in *Arizona* v. *California, et al.*, the Colorado River Compact, the Mexican Water Treaty, the body of statutes known as the Reclamation Law, the Boulder Canyon Project Act,[10] the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, the Colorado River Basin Project Act, the Navajo-San Juan Chama Act, and regulations of the Secretary of the Interior. (Citations, *supra*, at 5-6.)

The conflict of the decision below with the consumptive-use statutes is summarized in Parts II and III of the Argument.

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[8] Arizona v. California, 373 U.S. 546, 557, n. 23 (1963). The quantity thus "permanently withdrawn" is quoted by the Court of Appeals (p. 1214) from our adversaries' brief as aggregating 250,000 acre-feet annually.

[9] See the requirement stated in Sec. 601(c) of the Colorado River Basin Project Act, 43 U.S.C. § 1551(c). The relevant elements of the "Law of the River" are cited in the Argument.

[10] See particularly Sec. 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d.

The Complainants

The Chemehuevi Tribe of Indians owns a reservation in California adjacent to the Colorado River. The Tribe was decreed "present perfected rights" to waters of the main stream by Article II(D)(1) of the decree in *Arizona* v. *California, et al.*, 376 U.S. 340, 344 (1964).

The Cocopah Tribe of Indians owns a reservation in Arizona adjacent to the Colorado River. It was decreed "present perfected rights" to waters of the main stream by Article II(D)(2) of the same decree, 376 U.S. 340, 344.

Both tribes, being owners of present perfected rights, are further protected against shortage by Article II(B)(3) of that decree, 376 U.S. 340, 343, and the statute implementing that provision of the decree, 43 U.S.C. §1521(b).

The Committee to Save Black Mesa is a group interested in effects of some, but not all, of the plants on air quality. It does not allege that it owns any water rights.

The remaining complainants are the Sierra Club and five individuals, residents of the Navajo Reservation. None claims to own a water right which would be affected by use of water by any of the plants.

The Effect of the Decision

We thus have a case in which the court below issued a novel decision of nationwide effect, *i.e.*, "that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants," although (1) the legislative history and judi-

cial interpretation of Part I of the Federal Power Act (originally enacted as the Federal Water Power Act) demonstrate that Congress' sole concern was with regulation of hydro power generation, not steam power generation, and "surplus water" was no exception; (2) every one of the six plants would be exempt, on the court's own criteria, even if the court's construction of the Act were correct; and (3) in the Colorado River Basin the "Law of the River" would preclude the statement of a justiciable cause of action by any of the complainants in any court.

It is no answer to say that, if this is so, the Federal Power Commission will find, on remand, that the jurisdiction thus conferred upon it is "affected . . . by the jurisdiction of any other federal agency." Even if all consumptive uses in the Colorado River Basin were determined by the Federal Power Commission to be excluded from its jurisdiction by reason of the "Law of the River" (hence making this case moot, after an unnecessary trial), the mischief would have been done: the lower court's novel and erroneous construction of the Federal Power Act, enlarging the licensing jurisdiction of the Federal Power Commission to encompass all thermal plants using "surplus water" from a government dam (including in that term flowing water *below* as well as stored water *at* such a dam), would be the law controlling the Commission in this key Circuit. Most of these petitioners own or plan steam power plants outside the Colorado River Basin, and so are affected by the new interpretation of Section 4(e) irrespective of the effect given the "Law of the River" by the Commission on remand.

The national economic impact is discussed in Part I.

REASONS FOR GRANTING THE WRIT

The court below decided important questions of federal law (the applicability of Part I of the Federal Power Act, particularly Section 4(e) (16 U.S.C. § 797(e)), to steam electric generating plants) which have not been, but should be, settled by the Supreme Court. The holding conflicts with applicable decisions of this Court, notably *Federal Power Commission* v. *Union Electric Company*, 381 U.S. 90 (1965), and *Arizona* v. *California, et al.*, 373 U.S. 546 (1963), decree 376 U.S. 340 (1964).

I. THE NOVEL DECISION BELOW, EXPANDING THE JURISDICTION OF THE FEDERAL POWER COMMISSION TO ENCOMPASS THE LICENSING OF THE USE OF WATER BY STEAM ELECTRIC GENERATING PLANTS, CONFLICTS WITH ADMINISTRATIVE AND JUDICIAL INTERPRETATION OF THE FEDERAL POWER ACT, AND IS AN INVASION OF THE LEGISLATIVE FUNCTION IN AN AREA OF GRAVE CURRENT NATIONAL IMPORTANCE

1. The decision's novelty is self-evident, as is its conflict with the legislative history and administrative construction of the Federal Power Act.

For the first time in 54 years, a court has held that the licensing provisions of the Federal Power Act apply to the use of water in the boilers and condensing apparatus [11] of a steam electric generating plant.

As the court noted (pp. 1223-26), the Federal Power Commission has consistently interpreted the Act as restricting its jurisdiction to "the consideration of projects designed to produce water power," com-

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[11] See the court's opinion at 1213 and at 1232, n. 128, for descriptions of the cooling process.

mencing with its first annual report, which was submitted to Congress in 1921, [12] and continuing right down to the present decision of the Commission. This administrative construction has excluded all steam plants, without the "surplus water" distinction now created by the court below.

Paradoxically, however, the court decided that use of surplus water by steam generating plants falls within the scope of the Act, even though the legislative history of the surplus water clause in Section 4(e) of the Act shows that Congress' sole concern was the use of such water for the development of water power. *See, e.g.*, H.Rep. No. 592, 63rd Cong., 2d Sess. (1914); 51 Cong. Rec. 11068-70, 11403, 13256 (1914). Dams, water conduits, and reservoirs, used for water power generation, constituted Congress' sole concern in its consideration of the bills which resulted in the Federal Water Power Act, now Part I of the Federal Power Act. If, in 1920, as the court properly held, Congress did not

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[12] As the Court of Appeals said (p. 1225): ". . . the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction."

As this Court said in Udall v. Tallman, 380 U.S. 1, 16 (1965):

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." And in Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, et al., 367 U.S. 396, 408 (1961): "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'."

choose to require licenses for steam plants, even those using water from navigable streams, it certainly did not choose, by silence, to require licensing the use of "surplus water" by steam plants. The greater decision included the lesser.

The use of water in steam electric plants is largely a consumptive use,[13] as distinguished from the non-consumptive use of the energy in falling water in hydroelectric plants. Until now, the Commission has had no jurisdiction to license consumptive uses from a government dam, but only non-consumptive uses of the energy of falling water in hydroelectric power generation. Where Congress has intended a federal agency to have authority with respect to consumptive uses, it has invariably specified an agency other than the Federal Power Commission. (See Part II of this Argument.)

2. The decision below cannot be reconciled with that of this Court in *FPC* v. *Union Electric Company*, 381 U.S. 90 (1965).

In that case the Court, construing Section 23(b) of the Federal Power Act as encompassing a pumped-storage project on a non-navigable tributary, producing power transmitted in interstate commerce (whether or not it affected navigable waters downstream), rejected the argument that, if this were so, then the Act must be construed to require licenses of steam plants in the same circumstances. It said (p. 110) that:

> ". . . Part I, the original Federal Water Power Act, is concerned with the utilization of water re-

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[13] Diversions less returns to the river. Arizona v. California, 373 U.S. 546, 557, n. 23 (1963).

> sources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." (Footnote omitted.)

The decision below would erase that distinction, and substitute a new and curious one: that while steam plants using water from navigable streams do not require licenses, steam plants using surplus water from any government dams, even on non-navigable streams, do require a license.

The decision below thus squarely conflicts with *Union Electric* for the reason identified by the Court of Appeals itself (p. 1232):

> "If the 'power potential in water' is not involved when water is heated to drive a turbine, there would appear to be less warrant to conclude that it is involved when water is used in the post-generation, cooling process. And there would be no warrant to conclude that the mere extraction of water, with a consequent decrease in the amount of water available to downstream users for power generation, utilizes the 'power potential in water' in a manner impinging on the FPC's licensing jurisdiction."

3. The decision's change in the law is of nationwide importance, and amounts to judicial legislation in a field now under active consideration by Congress.

The court below concedes (p. 1231):

> ". . . Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

The opinion below cites facts enough to demonstrate its national impact. Thus, at pp. 1212-13:

> "Although estimates of the precise rate of growth vary, it is undisputed that the demand for electric power—as well, of course, as that for other kinds of energy—is increasing at a staggering rate. According to one source, consumption of electric power is growing by 9% per year, and demand for it is expected to double during each of the next two or three decades. The expected 250% increase in the demand for electric energy between 1970 and 1990 will require at least 255 new thermal-electric plants of 500,000 kilowatts to 2,000 megawatts capacity. Ninety-one of these plants will be fossil-fueled; 164 will be nuclear-fired.
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> The tremendous projected growth in the production of thermal-electric power is expected to increase cooling requirements from 120 billion gallons a day in 1971, about 10% of the average daily runoff in the continental United States, to 200 billion gallons a day by 1980 and to 600 billion gallons a day by 2000, an amount equivalent to 50% of the average daily runoff in the United States." (Footnotes omitted.)

The court's statistics, impressive as they are, tell only part of the story. The Federal Power Commission's projection [14] is that by the year 1990 there will be

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[14] FPC, 1970 National Power Survey, Tables 18.5 and 18.6 at I-18-6 (1971). Other sources of information include: FPC, News Release No. 19620, Tables 4, 5 (Sept. 12, 1973); Electrical World at 45-54 (Sept. 15, 1973); Edison Electric Institute, Fifty-fourth Semi-annual Electric Power Survey 17 (Oct. 1, 1973); National Petroleum Council, U.S. Energy Outlook 21 (Dec. 1972); National Petroleum Council, U.S. Energy Outlook: Fuels for Electricity 7 (1973). See also, Southern Interstate Nuclear Board, Power Plant Siting in the United States 1972—a State Summary 77-79 (Feb.

in service 1,520 fossil-fueled plants [15] with an aggregate capacity of 558,000,000 kw, and 408 nuclear plants with an installed capacity of 500,000,000 kw.[16] The total installed capacity of the Nation's thermal plants can be expected to treble by the year 1990.

This expansion is and will be nationwide.

As the court noted, all thermal plants use water for boiler and cooling purposes.

Congress now has under active consideration the question of whether a federal agency shall control the siting and licensing of steam electric plants, [17] and, if so, what agency. No one, until now, has suggested that Congress resolved this question 54 years ago. An issue so profoundly affecting the national economy is one for decision by Congress, and should not be left to the Court of Apeals for final resolution by a novel construction of an inapplicable statute. Congress, in making its determination, will hear interests and points of view not represented in this litigation.

15, 1973); National Water Commission, Water Policies for the Future, ch. 6 (June 1973).

[15] National Power Survey, Table 18.5 at I-18-6.

[16] National Power Survey, Table 18.6 at I-18-6.

[17] The Administration's proposed Electric Facilities Siting Act of 1973, S. 935; H.R. 4874, 93d Cong., 1st Sess. (1973); H.R. 180, H.R. 2373, H.R. 3591, and H.R. 5278, 93d Cong., 1st Sess. (1973). See also, Power Plant Siting and Environmental Protection Hearings before the Subcomm. on Communications and Power of the Comm. on Interstate and Foreign Commerce, House of Representatives (Serial No. 93-32); Hearings before the Subcomm. on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives on H.R. 5277 (revised) at 26-27, 92d Cong., 1st Sess. (1971). 4 BNA Environment Rep. Monograph No. 15 (June 22, 1973).

The court itself, after referring to pending proposals for legislation, quite properly said (pp. 1234-35):

> "We are restricted to the statute as written by the Congress, illuminated by legislative history, and construed by the Supreme Court. It is not our function either 'to rewrite a statute so that it will authorize what [we think] should be authorized' or to 'write into an act of Congress a provision which Congress affirmatively omitted.' These canons would be violated if we were to order the FPC to assert jurisdiction over fossil-fueled steam plants. The arguments made by petitioners would be better addressed to the Congress, which has not yet decided to provide explicitly for federal regulation of power plant siting." (Footnotes omitted.)

Those observations (directed to the "project works" clause of Section 4(e)) apply with equal force to the "surplus water" clause in the same sentence of the same section, as to which the court inexplicably reached the opposite result.

II. THE DECISION BELOW, IF ALLOWED TO STAND, WOULD CAUSE CHAOS NOT ONLY IN THE ADMINISTRATION OF THE FEDERAL POWER ACT, BUT ALSO IN THE ADMINISTRATION OF WATER RESOURCE PROJECTS WHICH CONGRESS HAS ENTRUSTED TO AGENCIES OTHER THAN THE FEDERAL POWER COMMISSION

The decision fails to define "surplus water from a Government dam," the pivot of its decision, or to give the Commission any criteria for making such a determination on remand, or to tell the Commission what kind of a government contract has the effect of excluding waters delivered thereunder from the status of "surplus," subjected to the Commission's jurisdiction. The resulting field of uncertainty is immense. Over

2,100 government dams are now in existence,[18] plus a large number of authorizations not yet implemented by appropriations.

The decision accepts the respondents' (complainants') contention that licenses are required retroactively here because (p. 1235):

> "... Petitioners contend that two of the Four Corners plants—[19] Navajo and Kaiparowitz [*sic*] will withdraw water directly from impoundments created by a Government dam, and the other four plants are downstream from Government dams and will have water available on a dependable basis only because of the 'stream regimen imposed by upstream government dams.'" (Footnote omitted.)

This poses two quite different jurisdictional assumptions: (1) that the use is of water stored behind a

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[18] The Dam Inspection Program Act of 1972, 33 U.S.C.A. § 467, directed the Corps of Engineers to compile a list of dams greater than 25 feet in height, or having reservoir capacity greater than 50 acre-feet. Preliminary figures are available from the Corps, and will be published in 1975. These show a total of 2,111 structures, the components being:

Bureau of Reclamation	488
Corps of Engineers	450
Tennessee Valley Authority	45
International Boundary and Water Commission	7
Forest Service	251
Bureau of Sport Fisheries and Wildlife	243
Geological Survey	7
Bureau of Land Management	569
Bureau of Indian Affairs	51

The data now being compiled by the Corps pursuant to this congressional directive is, of course, available to the Supreme Court. See the response of the Commissoner of Reclamation to the inquiry of Mr. Justice Douglas in United States v. Gerlach Live Stock Co., 339 U.S. 725, 759-60 (1950).

[19] (Our footnote.) See n. 7, *supra*.

government dam, or (2) that the use is made downstream from a government dam at a point where the stream regimen is affected by that dam (a use which does not necessarily involve a contract with the federal administrator of the dam).

1. As to the first hypothesis (re stored water used at a government dam, or released therefrom for downstream use pursuant to contract with the administrator of the dam), subsequent legislation has superseded the surplus water provisions of Section 4(e) with respect to dams administered by the Secretary of the Army, the Secretary of the Interior and some other agencies. [20]

Some 450 dams have been constructed by the Secretary of the Army (through the Corps of Engineers) under the authority of successive Flood Control Acts, or Rivers and Harbors Acts. [21] Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, directs the Secretary of the Army to turn over to the Secretary of the Interior power and energy surplus to the needs of the project, for disposition by the Secretary of the Interior. Section 6 of that Act, 33 U.S.C. Section 708, authorizes the Secretary of the Army to make contracts "for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Secretary of the Army." These two sections eliminate the applicability of the "surplus

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[20] In Udall v. FPC, 387 U.S. 428, 438 (1967), the Court, speaking of the effect of subsequent fishery enhancement legislation on the 1920 Federal Water Power Act, said: "We need not speculate as to what the 1920 purpose may have been. For the 1965 Anadromous Fish Act [citation omitted] is on this aspect of the present case in pari materia with the 1920 Act."

[21] These figures have been compiled from the 1970 and 1972 Annual Reports of the Chief of Engineers, Department of the Army. They exclude a large number of statutory authorizations not yet implemented by appropriations for construction.

water" clause of Section 4(e) of the Federal Power Act to use of water from flood control and navigation dams pursuant to contract. But the opinion would seem to make Section 4(e) applicable to use by downstream steam plants of the water released to make room for floods, and water passing through turbines at the dam.

Some 488 dams have been constructed, or authorized by Congress for construction, by the Secretary of the Interior, under the authority of the body of statutes known as the Reclamation Law.[22] Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), requires contracts with the Secretary for use of either water or power therefrom. There would appear to be no place for the operation of Section 4(e) here. But is Section 4(e) now to be made applicable to use by downstream steam plants of waters released through the turbines at the Reclamation dam, or flood waters discharged over its spillway, as contrasted with waters released for irrigation? The opinion seems to say so. (p. 1235)

With respect to dams constructed or authorized for construction by specialized agencies, contracts with the administrative agency are generally required for the use of water or power therefrom. The "integrated control system" of the Tennessee Valley Authority includes 45 dams, of which the United States, through TVA, owns 37 and "controls" eight.[23] The International Boundary and Water Commission, United States and Mexico, has constructed seven. Are licenses now to be required for the first time for downstream use of water released from such dams in the exercise of statutory or treaty functions?

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[22] United States Department of the Interior, Bureau of Reclamation, Water and Land Resource Accomplishments (1972).

[23] T.V.A. Handbook 53 (1972).

With respect to the 251 dams administered by the Forest Service, the 243 administered by the Bureau of Sports Fisheries and Wildlife, the 569 administered by the Bureau of Land Management, and the 51 administered by the Bureau of Indian Affairs, the lower court's decision may require a licensing proceeding for any steam plant downstream from such a dam.

The Colorado River Basin, we think, is a particularly clear example of the congressional decision to delegate to the Secretary of the Interior, to the exclusion of the Federal Power Commission, the authority to dispose of all power and all water made available by government dams for consumptive use. But this is the very basin in which the new jurisdiction of the Federal Power Commission is made to germinate by this opinion.

The consumptive use of water of the Colorado River Basin (*e.g.*, by steam electric plants) is controlled by the "Law of the River," *i.e.*, interstate compacts, acts of Congress, decrees of this and other courts, the Mexican Water Treaty, and, with respect to use of water from government dams, by acts of Congress which delegate federal authority exclusively to the Secretary of the Interior.

Thus, the Boulder Canyon Project Act, which controls use of water from the main stream in the Lower Basin (*e.g.*, by the Mohave Plant), specifies in Section 5 (43 U.S.C. § 617d) that:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

See *Arizona* v. *California*, 373 U.S. 546, 580 (1963). The Mohave Plant uses water pursuant to such a contract. In an earlier Colorado River case, *Arizona* v.

California, 298 U.S. 558, 570 (1936), the Court said (referring to the Boulder Canyon Project Act):

> "... the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated."

In the Upper Basin of the Colorado River, where the Navajo, Kaiparowits, Huntington, San Juan, and Four Corners Plants are located, Congress has been equally at pains to assure that no one can acquire the right to use waters stored by the United States except by contract with the Secretary. See Sections 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m, and Sections 11(a), (b), 13(a), (b), 14 of the San Juan-Chama Act, 43 U.S.C. §§ 615ss(a), (b), 615uu(a), (b), 615vv.[24] A statute (43 U.S.C. § 1523) authorized federal financial participation in the Navajo Plant, using water from Glen Canyon Dam, and specified that such use shall be debited to Arizona's apportionment under the Upper Colorado River Basin Compact. A special statute ratified the Secretary's contract to supply water to the San Juan Plant. Act of March 22, 1968, P.L. 90-272, U.S. Code Cong. & Admin. News, at 63 (1968).

Manifestly, Section 4(e) of the Federal Power Act, whatever assumption is made about its intended scope in 1920, has been rendered wholly inoperative in the

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[24] Coordinated operation of the reservoirs impounded by Hoover Dam (Lake Mead) and Glen Canyon Dam (Lake Powell) is required by Section 602 of the Colorado River Basin Project Act, 43 U.S.C. § 1552, and is implemented by the Secretary's regulations. 35 Fed. Reg. 8951 (1970).

Colorado River Basin by subsequent legislation. The opinion below, in this Colorado River case, is thus a declaratory judgment as to the Colorado River, but a drastically operative judgment (and a mistaken one) as to all the other river basins of the country.

2. As to the court's second hypothesis, *i.e.*, that FPC jurisdiction attaches to use by steam plants of water flowing below a government dam (at least absent a contract with the dam's administrator) wherever the regimen of the stream is affected by that dam: The decision is momentous in two respects: (1) because it construes "surplus water" for the first time to encompass all flowing waters in a reach (navigable or not) affected by an upstream government dam, and this includes nearly every river and stream in the country, and (2) because it would require a license for use of those free-flowing waters by a steam plant.

In only one case in 54 years has the Commission undertaken to invoke the surplus water clause of Section 4(e) with respect to such downstream water, even for licensing of a hydroelectric project, and in that case this same Court of Appeals set the Commission's order aside.

In *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), 15 F.P.C. 14 (1956), the Commission asserted licensing jurisdiction over certain hydroelectric plants (two of which were 57 and 59 miles downstream from a government dam). In our case the court quotes with apparent approval from the 1954 FPC decision in that case (p. 1235):

> "Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is 'surplus water,'

> and, if used for power development, would require a license from this Commission."

But this same court, in *California Oregon Power Co.* v. *FPC*, 239 F. 2d 426 (D.C. Cir. 1956), dismissed a petition for review of that FPC decision because of lack of a justiciable controversy (these being navigable waters, thus affording "admitted jurisdiction"). In doing so, it expressed its skepticism about the Commission's definition of "surplus waters," quoted above, which the same court now embraces:

> ". . . even counsel for the Commission is uncertain that this definition is correct.
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> "The record is, in fact, in such a state that we could hardly hold (if we reached the question) that Copco has been shown to be a user of surplus water, on any theory." *Id.* at 432.

Nevertheless, the court in the present case appears to have adopted, with respect to *steam* plants, the jurisdictional basis that it had declined to adopt in the earlier case, with reference to *hydroelectric* plants, *i.e.*, use of water flowing in a stream *below* a government dam.

The decision below thus apparently requires that in every case the Federal Power Commission must determine whether or not some government dam upstream from a thermal power plant has "imposed a regimen" on the stream at the point at which water is taken, or is proposed to be taken, for boiler or cooling purposes. If so, then a license is required. If not, then no license is required. How far downstream does the aura of federal jurisdiction extend, absent a contract requiring the release of such waters? If a flood control dam shaves an inch off the crest of a flood 50 miles downstream, does a steam plant located

there require a license? Does it matter whether the stream at that point is navigable or not? The opinion gives no criteria.

The geographical scope of the decision is as disturbing as its legislative character. The 2,100 existing government dams are located in every river basin of consequence in the United States. It is safe to say that substantially every steam electric generating station, existing or planned, is thus downstream from some government dam.

The decision thus not only thrusts the Federal Power Act into potential collision with the great water conservation statutes enacted in the ensuing half century, in which Congress elected to designate agencies other than the Federal Power Commission as administrators of the water and power resources created by government dams, *supra,* and as enforcement agencies with respect to stream pollution,[25] but also leaves the Commission with a hopelessly obscure new mandate controlling its own administration of the Federal Power Act.

III. THE DECISION BELOW ERRONEOUSLY PRESUPPOSES THE RIGHT OF A WATER USER IN ONE STATE OR BASIN OF THE COLORADO RIVER TO COMPLAIN OF USES OF WATER IN ANOTHER STATE OR BASIN. THESE COMPLAINANTS LACK STANDING

The "Law of the River" precludes the recognition of the complaint in this case as presenting a justiciable case or controversy with relation to the consumptive

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[25] *See, e.g.,* the Federal Water Pollution Control Act, 33 U.S.C. § 1227; the National Environmental Policy Act, 42 U.S.C. § 4321.

use of water of the Colorado River system by any of the six power plants.

All of these plants are using water in conformity with the inter-basin apportionments made by the Colorado River Compact (H. Doc. 717, 80th Cong., Appendix 203, p. A17), and the intra-basin apportionments which were made, with respect to uses in the Upper Basin, by the Upper Colorado River Basin Compact (H. Doc. 717, 80th Cong., Appendix 231, p. A167), and, with respect to uses in the Lower Basin, by the decree in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964).

These elements of the Law of the River preclude objections by a water user in one basin against uses of water in the other basin which are consistent with the Colorado River Compact, *Arizona* v. *California,* 350 U.S. 114 (1956), and preclude objections by a water user against uses by others in the same basin which are consistent with the intra-basin apportionments referred to.

Moreover, the Chemehuevi Tribe and Cocopah Tribe own present perfected rights to the use of water in quantities and with priorities which are protected from impairment by any water user by the decree in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), Article II (D)(1), (2), and II(B)(3), supplemented by the shortage provisions of the Colorado River Basin Project Act of 1968, 43 U.S.C. Section 1521(b)(c), and by Articles VII, VIII of the Colorado River Compact.

The individual complainants, and the Committee to Save Black Mesa, are apparently residents of New Mexico, but none alleges ownership of any water right. The only Indian tribe having interests in the San Juan River, the Navajo Tribe, has granted all necessary

authorizations for use of coal and water by these plants.[28] As to the Sierra Club, the court below properly held that it lacked standing to seek judicial review of the FPC order (p. 1212, n. 12), citing *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

Thus, none of the complainants could present a justiciable case or controversy in any judicial proceeding founded (as this complaint was) on the "complainees'" consumptive use of water of the Colorado River System, because each complainant is precluded by the Law of the River from objecting to the use of water by any of the six plants. All of the complainants accordingly lack standing to complain of such use. *Arizona* v. *California*, 298 U.S. 558, 566, 567 (1936); *Arizona* v. *California*, 283 U.S. 423, 463-64 (1931); *New York* v. *Illinois*, 274 U.S. 488, 489 (1927); *New Jersey* v. *Sargent*, 269 U.S. 328, 338 (1926).

To hold otherwise would require radical interpretations of the controlling interstate compacts, and of the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), which could not be adjudicated in the absence of the parties to those compacts and that decree.

Congress, of course, did not authorize the Federal Power Commission to resolve objections to use of water which would not be justiciable in judicial proceedings, and could not constitutionally do so.

CONCLUSION

The issues in this case are novel, and of such grave national importance as to justify resolution of them by the Supreme Court. They should not be left in the

[28] App. 88a.

state of uncertainty created by the lower court's remand to the Federal Power Commission, nor, with all respect, should they be left for resolution by the Court of Appeals.

If the decision below is not reversed or vacated, the result will be that drastically new law affecting the construction and operation of thermal electric plants throughout the United States (except in the Colorado River Basin) will have been made by a decision with respect to Colorado River plants which are exempt from FPC licensing by the terms of the court's own criteria.

This decision is thus, in effect, a declaratory judgment which has no meaningful application to the case before it, because our case is within the exceptions that it prescribes, but which, if allowed to stand, would change the law on a nationwide basis, except in the very river basin which is involved in the decision. Most of these petitioners also have power plants outside the Colorado River Basin, and so would be affected by this dichotomy.

The Commission would be required to invent all the terms of a steam plant license, without guidance from a statute which is understandably silent on a subject that it was never intended to encompass.

Such a change in the law, if it is to be made, should be made by Congress, not the courts. Congress now has under active consideration this very question, of what authority it shall newly delegate, and to what agencies, with respect to the siting and licensing of thermal power plants. Congress will hear many

vitally affected people and points of view not represented in this case.

Respectfully submitted,

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ATTACHMENT A

STATUTORY PROVISIONS

Federal Power Act

Section 4(e) of the Federal Power Act, 16 U.S.C. Section 797(e) provides:

"[Sec. 797] The Commission is authorized and empowered—

* * * * *

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated im-

provement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection."

Section 23(b) of the Federal Power Act, 16 U.S.C. Section 817, provides:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Com-

mission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws. June 10, 1920, c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846."

Boulder Canyon Project Act

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

"Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Reclamation Project Act of 1939

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), provides:

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such

project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

Colorado River Storage Project Act

Sections 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m, provide:

"Sec. 4. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto): *Provided,* That (a) irrigation repayment contracts shall be entered into which, except as otherwise provided for the Paonia and Eden projects, provide for repayment of the obligation assumed thereunder with respect to any project contract unit over a period of not more than fifty years exclusive of any development period authorized by law; (b) prior to construction of irrigation distribution facilities, repayment contracts shall be made with an 'organization' as defined in paragraph 2(g) of the Reclamation Project Act of 1939 (53 Stat. 1187) which has the capacity to levy assessments upon all taxable real property located within its boundaries to assist in making repayments, except where a substantial proportion of the lands to be served are owned by the United States; (c) contracts relating to municipal water supply may be made without regard to the limitations of the last sentence of section 9(c) of the Reclamation Project Act of 1939; and (d), as to Indian lands within, under or served by any participating project, payment of construction costs within the capability of the land to

repay shall be subject to the Act of July 1, 1932 (47 Stat. 564): *Provided further*, That for a period of ten years from the date of enactment of this Act, no water from any participating project authorized by this Act shall be delivered to any water user for the production on newly irrigated lands of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity for the marketing year in which the bulk of the crop would normally be marketed is in excess of the normal supply as defined in section 301(b) (10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security. All units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States (Treaty Series 994).

* * * * *

"Sec. 14. In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise."

Navajo-San Juan Chama Project Act

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss(a), (b), 615uu(a), (b), 615vv provide:

Sec. 615ss(a), (b):

"(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects execept under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title. Such contracts, which, in the case of water for Indian uses, shall be executed with the Navajo Tribe, shall make provision, in any year in which the Secretary anticipates a shortage, taking into account both prospective runoff originating above Navajo Reservoir and the available water in storage in Navajo Reservoir, for a sharing of the available water in the following manner: The prospective runoff shall be apportioned between the contractors diverting above and those diverting at or below Navajo Reservoir in the proportion that the total normal diversion requirement of each group bears to the total of all normal diversion requirements. In the case of contractors diverting above Navajo Reservoir, each such contract shall provide for a sharing of the runoff aportioned to said group in the same proportion as the normal diversion requirement under said contract bears to the total normal diversion requirements of all such contracts that have been made hereunder: *Provided*, That for any year in which the foregoing sharing procedure either would apportion to any contractor diverting above Navajo Reservoir an amount in excess of the runoff anticipated to be physically available at the point of his diversion, or would result in no water being available to one or more such contractors, the runoff apportioned to said group shall

be reapportioned, as near as may be, among the contractors diverting above Navajo Reservoir in the proportion that the normal diversion requirements of each bears to the total normal diversion requirements of the group. In the case of contractors diverting from or below Navajo Reservoir, each such contract shall provide for a sharing of the remaining runoff together with the available storage in the same proportion as then normal diversion requirement under said contract bears to the total normal diversion requirements under all such contracts that have been made hereunder.

"The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 615jj and 615pp of this title.

"No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts: *Provided*, That nothing contained in the foregoing shall be construed to forbid the Secretary from entering into temporary water supply contracts in the San Juan River Basin for any year in which he determines that water legally available for use in the upper basin of the Colorado River system would otherwise not be used there and is not needed to fulfill the obligations of the upper division States with respect to delivery of water at Lee Ferry.

"(b) If contracts are entered into for delivery from storage in Navajo Reservoir of water not covered by subsection (a) of this section, such contracts shall be subject to the same provision for sharing of available water supply in the event of shortage as in the case of contracts required to be made pursuant to subsection (a) of this section.

Sec. 615uu(a), (b):

"(a) The use of water, including that diverted from the Colorado River system to the Rio Grande Basin, through works constructed under authority of sections 615ii-615yy of this title, shall be subject to and controlled by the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, and the Mexican Water Treaty (Treaty Series 994), and shall be included within and shall in no way increase the total quantity of water to the use of which the State of New Mexico is entitled and limited under said compacts, statutes, and treaty, and every contract entered into under sections 615ii-615yy of this title for the storage, use, and delivery of such water shall so recite.

"(b) All works constructed under authority of sections 615ii-615yy of this title, and all officers, employees, permittees, licensees, and contractees of the United States and of the State of New Mexico acting pursuant thereto and all users and appropriators of water of the Colorado River system diverted or delivered through the works constructed under authority of sections 615ii-615yy of this title and any enlargements or additions thereto shall observe and be subject to said compacts, statutes, and treaty, as hereinbefore provided, in the diversion, delivery, and use of water of the Colorado River system, and such condition and covenant shall attach as a matter of law whether or not set out or referred to in the instrument evidencing such permit, license, or contract and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming and the users of water therein or

thereunder by way of suit, defense or otherwise in any litigation respecting the waters of the Colorado River system.

Sec. 615vv:

"In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by sections 615ii-615yy of this title, the Secretary is directed to comply with the applicable provisions of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act and the treaty with the United Mexican States in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise. Pub.L. 87-483, § 14, June 13, 1962, 76 Stat. 101."

Act of March 22, 1968, P.L. 90-272

Act of March 22, 1968, P.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968):

"NAVAJO RESERVOIR, NEW MEXICO—WATER DELIVERY CONTRACTS

"PUBLIC LAW 90-272; 82 STAT. 52

[S. J. Res. 123]

"Joint Resolution to approve long-term contracts for delivery of water from Navajo Reservoir in the State of New Mexico, and for other purposes.

"WHEREAS section 11(a) of the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483), provides that: 'No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 2 (Navajo Indian irrigation project) and 8 (San Juan-Chama project) of this Act, shall be entered into for

the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigation that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin Compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts'; and

"WHEREAS the Secretary has made such determination in connection with the following contracts transmitted to Congress by letter dated November 21, 1967:

	Water diversion (acre-feet)	Estimated water depletion (acre-feet)	Proposed uses
"Public Service Company of New Mexico	20,200	16,200	Thermal-electric generation.
"Southern Union Gas Company	50	50	Pump cooling
Utah Construction and Mining Company	44,000	35,300	Thermal-electric generation.
	64,250	51,550	

"Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

"Such contracts are hereby approved by the Congress. The Secretary may enter into amendments thereto which would in his judgment be in the interest of water conservation, but the total water depletion shall not exceed the estimates set forth in this joint resolution.

"Approved March 22, 1968."

Colorado River Basin Project Act

Sections 301(b), (c), and 303(a),(b),(c),(d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521(b), (c), 1523(a),(b),(c),(d):

Sec. 1521(b), (c):

"(b) Article II(B) (3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree.

"(c) The limitation stated in subsection (b) of this section shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada.

* * * * *

Sec. 1523(a), (b), (c), (d):

"(a) The Secretary is authorized and directed to continue to a conclusion appropriate engineering and economic studies and to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity, or any combination thereof, including participation, operation, or construction by non-Federal entities, for the purpose of supplying the power requirements of the Central Arizona Project and augmenting the Lower Colorado River Basin Development Fund: *Provided*, That nothing in this section or in this Act contained shall be construed to authorize the study or construction of any dams on the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam.

"(b) If included as a part of the recommended plan, the Secretary may enter into agreements with non-Federal interests proposing to construct thermal generating powerplants whereby the United States shall acquire the right to such portions of their capacity, including delivery of power and energy over appurtenant transmission facilities to mutually agreed upon delivery points, as he determines is required in connection with the operation of the Central Arizona Project. When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, including its marketing in conjunction with the sale of power and energy from Federal powerplants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates. The agreements shall provide, among other things, that—

"(1) the United States shall pay not more than that portion of the total construction cost, exclusive of interest during construction, of the powerplants, and of any switchyards and transmission facilities serving the United States, as is represented by the ratios of

the respective capacities to be provided for the United States therein to the total capacities of such facilities. The Secretary shall make the Federal portion of such costs available to the non-Federal interests during the construction period, including the period of preparation of designs and specifications, in such installments as will facilitate a timely construction schedule, but no funds other than for preconstruction activities shall be made available by the Secretary until he determines that adequate contractual arrangements have been entered into between all the affected parties covering land, water, fuel supplies, power (its availability and use), rights-of-way, transmission facilities and all other necessary matters for the thermal generating powerplants;

"(2) annual operation and maintenance costs shall be apportioned between the United States and the non-Federal interests on an equitable basis taking into account the ratios determined in accordance with the foregoing clause (1): *Provided, however,* That the United States shall share on the foregoing basis in the depreciation component of such costs only to the extent of provision for depreciation on replacements financed by the non-Federal interests;

"(3) the United States shall be given appropriate credit for any interests in Federal lands administered by the Department of the Interior that are made available for the powerplants and appurtenances;

"(4) costs to be borne by the United States under clauses (1) and (2) shall not include (a) interest and interest during construction, (b) financing charges, (c) franchise fees, and (d) such other costs as shall be specified in the agreement.

"(c) No later than one year from September 30, 1968, the Secretary shall submit his recommended plan to the Congress. Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress.

"(d) If any thermal generating plant referred to in subsection (b) of this section is located in Arizona,

and if it is served by water diverted from the drainage area of the Colorado River system above Lee Ferry, other provisions of existing law to the contrary notwithstanding, such consumptive use of water shall be a part of the fifty thousand acre-feet per annum apportioned to the State of Arizona by article III (a) of the Upper Colorado River Basin Compact (63 Stat. 31)."

Colorado River Compact

(H. Doc. 717, 80th Cong., pp. A19, A21)

"ARTICLE III

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

* * * * *

"ARTICLE VII

"Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

"ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Upper Colorado River Basin Compact

(H. Doc. 717, 80th Cong., p. A169)

"ARTICLE III

"(a) Subject to the provisions and limitations contained in the Colorado River Compact and in this Compact, there is hereby apportioned from the Upper Colorado River System in perpetuity to the States of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

"(1) To the State of Arizona the consumptive use of 50,000 acre-feet of water per annum.

"(2) To the States of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by Upper Basin [*sic*] under the Colorado River Compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the State of Arizona.

State of Colorado ..... 51.75 percent,

State of New Mexico .... 11.25 percent,

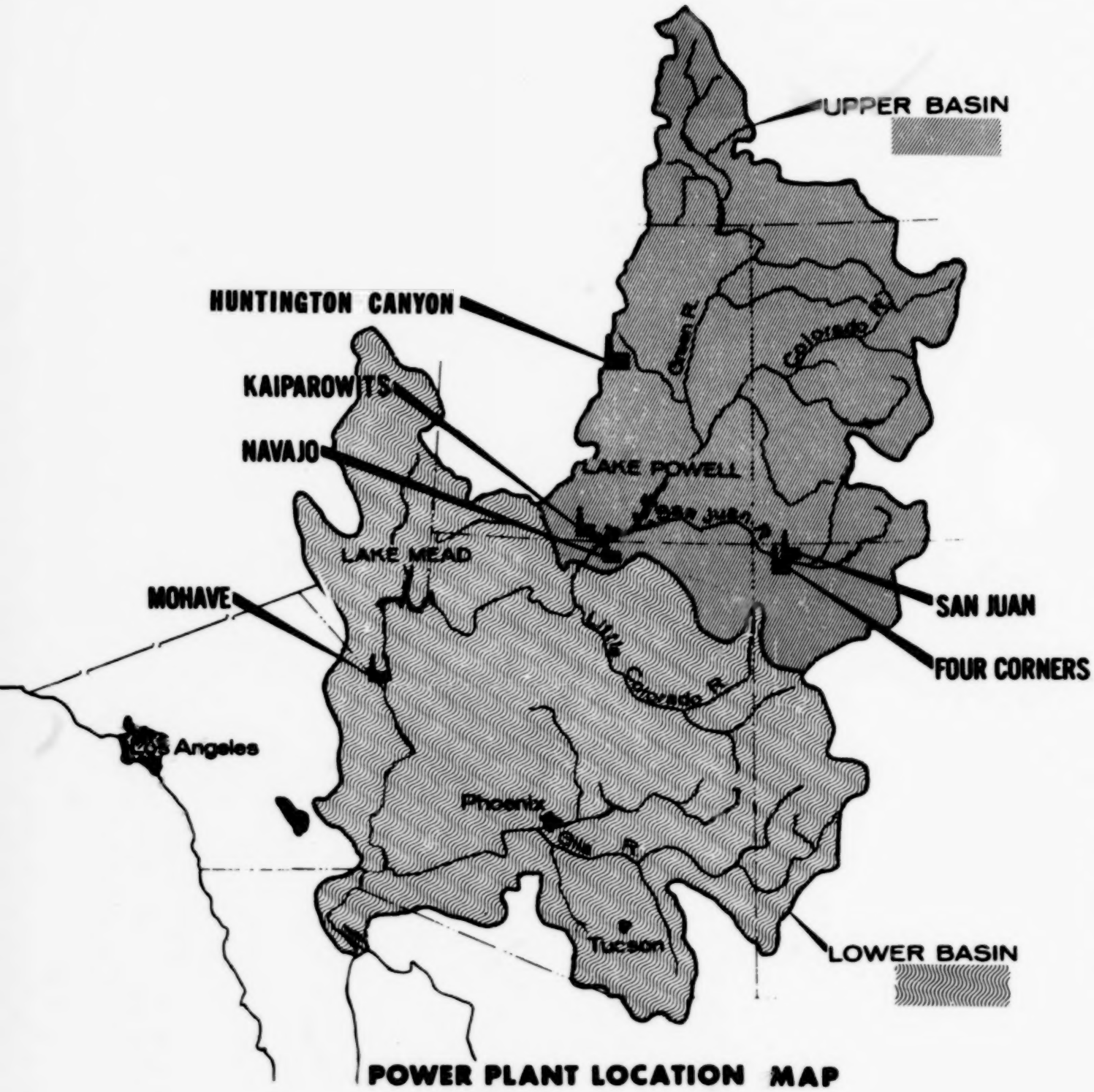
State of Utah ..... 23.00 percent,

State of Wyoming ..... 14.00 percent."

ATTACHMENT B

Ownership of Power Plants

Plant	*Owner*	*Percentage*
Mohave	Southern California Edison Company	56
	Nevada Power Company	14
	Department of Water & Power, City of Los Angeles	20
	Salt River Project Agricultural Improvement & Power District	10
Navajo	United States of America	24.3
	Salt River Project Agricultural Improvement & Power District	21.7
	Arizona Public Service Company	14
	Tucson Gas & Electric Company	7.5
	Nevada Power Company	11.3
	Department of Water & Power, City of Los Angeles	21.2
Kaiparowits	Arizona Public Service Company	18
	Southern California Edison Company	40
	San Diego Gas & Electric Company	23.4
	Salt River Project Agricultural Improvement & Power District	10
	Unassigned	8.6
Huntington	Utah Power & Light Company	100
San Juan	Tucson Gas & Electric Company	50
	Public Service Company of New Mexico	50
Four Corners	Arizona Public Service Company	100
First 3 units	Arizona Public Service Company	15
Units 4 & 5	El Paso Electric Company	7
	Public Service Company of New Mexico	13
	Salt River Project Agricultural Improvement & Power District	10
	Southern California Edison Company	48
	Tucson Gas & Electric Company	7



POWER PLANT LOCATION MAP

COLORADO RIVER BASIN

ATTACHMENT C